**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| BellSouth Telecommunications, Inc. | ) | |
| BellSouth Tariff FCC No. 1 | ) | CC Docket No. 98-161 |
| BellSouth Transmittal No. 476 | ) | |
| | ) | |

**Ameritech Comments on BellSouth Direct Case**

On August 18, 1998, BellSouth Telecommunications, Inc. filed Transmittal No. 476 establishing an ADSL service to be used primarily by Internet service providers. On September 1, 1998, the Commission issued a Designation Order seeking comments on whether DSL service should be tariffed in the Federal jurisdiction. The issues raised in this Designation Order are identical to those raised in CC Docket 98-79. Accordingly, Ameritech attaches hereto and submits as its comments in this docket a copy of its comments in CC Docket 98-79.

Respectfully submitted,

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(202) 326-3817

September 18, 1998

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
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| In the Matter of | ) | |
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| GTE Telephone Operating Companies | ) | CC Docket No. 98-79 |
| GTOC Tariff No. 1 | ) | |
| GTOC Transmittal No. 1148 | ) | |

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# AMERITECH COMMENTS ON GTE DIRECT CASE

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## AMERITECH COMMENTS ON GTE DIRECT CASE

## I. INTRODUCTION AND SUMMARY

The Ameritech Operating Companies (Ameritech) hereby submit the following comments in response to the direct case filed September 8, 1998, by GTE Service Corporation and its affiliated domestic telephone operating companies (GTE) in response to the Commission's Order Designating Issues for Investigation in the above-captioned matter.[1]

In its Direct Case, GTE demonstrates irrefutably that its DSL offering is an interstate access service. It does so by citing a veritable avalanche of case law holding that the boundaries of a communication are determined with reference to its ultimate beginning and end points and without regard to any intermediate switching. In fact, as GTE's Direct Case shows, the Commission and the courts have unfailing adhered to this view for over fifty years. It would be hard to find a legal principle that is more settled.

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[1] *See GTE Telephone Operators [sic], GTOC Tariff FCC No. 1, GTOC Transmittal No. 1148, Order Designating Issues for Investigation*, CC Docket No 98-79 (CCB Aug. 20, 1999) (Designation Order).

The Commission has nevertheless set GTE's tariff for jurisdictional investigation. It has done so – if truth be told – because a conclusion that DSL service is an interstate service inevitably means that a dial-up connection to the Internet over the circuit-switched network is likewise an interstate service. And that conclusion – that a dial-up connection to the Internet is jurisdictionally interstate – is dispositive of CLEC reciprocal compensation claims under section 251(b)(5) of the Communications Act because it necessarily means that telecommunications routed to an Internet service provider (ISP) does not terminate at the ISP switch.[2]

The Commission's reluctance to address reciprocal compensation issues is baffling.[3] Just yesterday, it was reported that Covad Communications – a fast-

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[2] GTE's claim that the Commission need not address reciprocal compensation issues in ruling on its DSL tariff rings hollow. While that statement may literally be correct, the fact is that the Commission's decision with respect to GTE's tariff will be dispositive of any section 251(b)(5) claim with respect to ISP traffic.

[3] It has been suggested that the Commission lacks authority to address whether or not section 251(b)(5) applies to interstate traffic. This suggestion is based on a misinterpretation of *Iowa Utilities Board* v. *FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 879 (1998). That case did not address the Commission's authority under section 251 *per se;* it addressed the Commission's authority to regulate ***intrastate*** traffic under section 251. The court concluded that "section 2(b) [of the Communications Act], 47 U.S.C. §152(b), prevents the FCC from issuing regulations involving telecommunication matters that are fundamentally intrastate in character." It did not, however, in any way alter the FCC's longstanding jurisdiction over interstate communications services – jurisdiction that is conferred not only by the clear language of the Communications Act, but by the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3). Rather, the court acknowledged that "[w]hile subsection 201(b) does grant the FCC jurisdiction over charges regarding communications services, those services are expressly limited to interstate or foreign communications services[.]" *Id.*

The absurdity of the suggestion that the FCC has been stripped of its power to address the application of reciprocal compensation to interstate traffic is evident from the fact that, if that suggestion were true, then states would be free to superimpose reciprocal compensation obligations, not only ISP traffic, but on other types of interstate traffic, including access traffic that is currently subject to the Part 69 regime. Indeed, states could require the payment of reciprocal compensation when two interexchange carriers interconnected their facilities to

growing CLEC that provides DSL services – urged the Commission to abolish reciprocal compensation for ISP traffic.[4] Characterizing reciprocal compensation for ISP traffic as a "boondoggle," Covad noted that reciprocal compensation disincents CLECs from upgrading their networks to the very types of advanced infrastructures the Commission is required by law to encourage. What Covad did not, but could also have said, is that it likewise disincents ISPs from moving off the circuit-switched network for their access service. So long as CLECs can claim, collectively, hundreds of millions, if not billions, of dollars in reciprocal compensation subsidies, they will do everything in their power to keep their ISP customers on the circuit-switched network.

Even more troubling, however, is that, in ducking the reciprocal compensation issue, the Commission is playing fast and loose with decades of precedent that are rooted, not only in the very fabric of the Communications Act, but in the Commerce Clause of the United States Constitution. The reason it is well settled that the jurisdictional boundaries of a communication are determined on an end-to-end basis is because that is the only way to protect the exclusive right of the federal government – and more specifically, this Commission – to regulate interstate telecommunications. If an end-to-end communication were subject to bifurcated jurisdiction, states would effectively

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complete a long-distance call. Obviously, the states do not have such authority, and if they attempted to impose reciprocal compensation obligations in those situations, the Commission could step in. For the very same reason, the Commission has sole authority to decide whether the reciprocal compensation provisions of the Act apply to ISP traffic.

[4] *Communications Daily*, Sept. 17, 1998.

have veto power over all federal policies. The link from an end user to an ISP is the gateway to the Internet, an absolutely critical instrumentality of interstate commerce. By tampering with longstanding principles that make it clear that this link is part of an interstate communication, the Commission is playing with fire.

## ARGUMENT

## II. DSL SERVICE, LIKE ANY SERVICE THAT CONNECTS AN END USER TO AN ISP, IS AN INTERSTATE ACCESS SERVICE.

The Internet has been described as a "global web of linked networks and computers[,]" a "decentralized, global medium of communications – or 'cyberspace' – that links people, institutions, corporations, and governments around the world."[5] The United States Supreme Court has characterized the Internet as "a unique and wholly new medium of worldwide human communication."[6] It is defined in the Telecommunications Act of 1996 as "the international computer network of both Federal and non-Federal interoperable packed switched data networks."[7] The Commission has recognized that the lines

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[5] Barbara Esbin, Associate Bureau Chief, Cable Services Bureau, *Internet over Cable: Defining the Future in Terms of the Past*, FCC Office of Plans and Policy Working Paper No. 30, August 1998 at 6, *citing, ACLU v. Reno*, 929 F. Supp. 824, 830-849 (E.D. Pa. 1996), aff'd, *117 S. Ct. 2329 (1997).*

[6] *ACLU v. Reno*, 117 S. Ct. at 2334.

[7] 47 U.S.C. 230(e)(1).

used by Internet Service Providers to transmit Internet traffic over the Internet are subject to federal jurisdiction.[8]

CLECs do not dispute that the Internet itself is used for the transmission of interstate and foreign communications and is thus subject to the Commission's jurisdiction. They argue, instead, that services by which end users connect to the Internet must be jurisdictionally distinguished from the Internet transmissions that are sent via those connections. They argue that telecommunications sent by an end user to an ISP for transmission onto the Internet terminates at the ISP switch and that, to the extent an ISP is located in the same local calling area as the end user, that traffic is local. As GTE shows, this argument is at war with at least fifty years of precedent. It is unsupported, unsupportable, and must be rejected.

### A. It is Well Settled That the Boundaries of a Communication Are Defined on an End-To-End Basis.

The fundamental flaw in the CLEC argument is that it cannot be squared with the long recognized principle that the boundaries of a communication are deemed to be its ultimate beginning and end points, without regard to intermediate switching. This principle was recognized as early as 1944, when a federal district court rejected the argument that local access to a PBX could be viewed as jurisdictionally distinct from the long distance call that followed.

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[8] *Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501 (1998) (*Universal Service Report)* at ¶ 67 ("The provision of leased lines to Internet service providers, however, constitutes the provision of interstate telecommunications.")

Relying on the language of the Communications Act and judicial precedent, the court concluded "the Communications Act contemplates the regulation of interstate wire communication from its inception to its completion."[9]

Since then, this principle has been repeatedly recognized and applied in a variety of contexts. For example, in 1965, the United States Court of Appeals for the District of Columbia Circuit held that the Commission had jurisdiction over microwave facilities located wholly within the state of Idaho to the extent those facilities were used to transmit signals that ultimately cross state boundaries.[10]

Four years later, the same court applied this principle to CATV distribution facilities. It held that common carrier lines used to distribute cable television programming within a state are subject to FCC jurisdiction because the signals transmitted via those lines had originated as over the air broadcasts, which are subject to the FCC's jurisdiction. The court stated:

> The controlling facts here are that the cable facilities furnished by the telephone companies are links in the continuous transmission of the signals from the point of origin to the set of the viewer, and the intelligence received by the viewer is essentially the same as that transmitted by the broadcaster. Irrespective of the location of its physical facilities, the common carrier which thus participates as a link in the relay of the television signals is performing an interstate communications service.[11]

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[9] *United States v. AT&T*, 57 F. Supp. 451, 453-55 (S.D. N.Y. 1944), *aff'd*, 325 U.S. 837 (1945).

[10] *Idaho Microwave, Inc. v. FCC*, 352 F.2d 729, 732 (D.C. Cir. 1965) (the facility is "used as a link in the continuous transmission of television signals from [Utah] to [Idaho]" and concluding "though Idaho Microwave's physical facilities are located within Idaho, it performs an interstate communication service when it takes part in the transmission of signals from Utah to Idaho.")

[11] *General Telephone Co. of California v. FCC*, 413 F 2d 390, 397 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

The Commission as well, has recognized that the boundaries of a communication are determined on an end-to-end basis. It has squarely and repeatedly rejected arguments that a communication "terminates" at an intermediate switching point. For example, in *Southwestern Bell Telephone Co.*, the Commission held that access to a credit card switch is "an intermediate step in a single end-to-end communications" the boundaries of which define the jurisdictional nature of the whole.[12]

Likewise, in *Teleconnect v. Bell Telephone Company of Pa.*, the Commission rejected the argument that an 800 call used to connect to an interexchange carrier's switch was separate and distinct call from the call that was placed from that switch. Addressing the issue in the first instance, the Common Carrier Bureau noted "there is an assumption that an interstate communication extends from the inception of a call to its completion. Just as Commission regulation does not end with an intermediate switch, neither does the character of [a] call change at [an] intermediate switch."[13] The Commission affirmed:

> We agree with the Bureau that a caller using the Teleconnect ACA service is making a single call. As the Bureau correctly noted, both court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications. ... [T]he interstate communication itself extends from the inception

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[12] *Southwestern Bell Telephone Co.*, 3 FCC Rcd 2339, 2341 (1988).

[13] *Teleconnect Co. v. Bell Telephone Co. of Pa.*, 6 FCC Rcd 5202 (Com. Car. Bur. 1991) at ¶ 24.

> of a call to its completion, regardless of any intermediate facilities.[14]

Continuing, the Commission observed:

> In general all of the defendants' arguments ignore the fact that ACA service conveys a single communication from the caller to the called party. Indeed, from the caller's point of view, any intermediate switching during the call is, as Teleconnect claims, "transparent." The record reflects that the user of ACA service intends to make a single call terminating not at the Teleconnect intermediate switch, where the Megacom link ends, but at the telephone line of the called party.[15]

Significantly, the principle that the boundaries of a communication are defined on an end-to-end basis is applied even to traffic that leaves the public switched network.[16] Moreover, it has been applied to enhanced, as well as basic, services. Thus in the *Voice Mail Preemption Order*, the Commission held that when an end user accesses a voice mail apparatus, there is a continuous transmission path from the caller to that apparatus.[17] The Commission rejected the State of Georgia's argument that access to a voice mail service from out-of-state involves two, jurisdictionally distinct communications: the interstate call to the local telephone company switch, and the intrastate communication from the

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[14] *Teleconnect v. Bell Telephone Co. of Pa.*, 10 FCC Rcd 1626 (1995) at ¶ 12, *aff'd, Southwestern Bell Telephone Co. v. FCC*, No. 95-1193 (D.C. Cir. June 27, 1997).

[15] *Id. at ¶ 14.*

[16] *See United States v. AT&T, supra* (rejecting a clam that the FCC's jurisdiction over interstate wire communication ends at the switchboard of a PBX). *See also Southern Pacific Communications Company Tariff FCC No. 4*, 61 FCC 2d 144, 146 (1976) ("As we have often recognized, this Commission's jurisdiction over interstate communications does not end at the local switchboard, it continues to the transmission's ultimate destination.")

[17] *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corp.*, 7 FCC Rcd 1619, 1621 (1992).

switch to the voice mail apparatus. Rather, it concluded, there is a single interstate communication, the boundaries of which are defined by the location of the caller and the voice mail equipment.

The longstanding principle that communications are defined on an end-to-end basis, is dispositive of this investigation.[18] It compels the conclusion that traffic sent to an ISP for transmission onto the Internet terminates, not at the ISP switch, but at the web site or sites to which it is sent. That, in turn, means that this traffic is access traffic which, given the global nature of the Internet, is jurisdictionally interstate.[19] Indeed, as shown below, the Commission has long recognized as much.

### B. The Commission Has Long Recognized that the Link From An End User to an ISP is an Access Service.

Since the adoption of the Part 69 access charge regime at the time of the divestiture, the Commission has consistently recognized that traffic sent by an end user to an ESP, such as an ISP, is access traffic. The Commission's rulings in this regard date back to the adoption of the access charge regime in 1983. When the Commission first adopted the Part 69 access charge regime, the Commission recognized the need for a uniform structure for access charges "covering those

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[18] The Commission has held that ISPs are information service providers and that there is virtually no distinction between an information service provider and what used to be called an enhanced service provider (ESP). *Universal Service Report* at ¶¶ 73-77.

[19] While some Internet traffic may terminate at intrastate or even local web sites or databases, this intrastate traffic is not separable. *See infra*. Thus, the link from an end user to an ISP is subject to the Commission's exclusive jurisdiction. In any event, even if the traffic was separable, that would mean only that state, as well as federal, tariffs would have to be filed. .

services that make identical use of access facilities," including enhanced services.[20] On reconsideration of this order, however, the Commission decided to carve out what it characterized as temporary access charge exemptions for resellers and ESPs.

In exempting ESPs from the access charge regime, the Commission in no way suggested that ESPs did not, in fact, use exchange access services to connect to their customers. To the contrary, it specifically recognized that they did, noting "among the variety of users of access service are ... enhanced service providers[.]"[21] The Commission decided, however, that for policy reasons, ESPs should not yet have to pay Part 69 access charges. Specifically, recognizing the high costs of exchange access at the time and stating its desire to protect the fledgling information services industry from rate shock, the Commission held that ESP access traffic should be temporarily subject to local exchange rates.

On appeal, the United States Court of Appeals for the D.C. Circuit echoed the Commission's recognition that ESPs use exchange access facilities to connect to their end users, and that, due to the FCC exemption, "[the access charges paid by ...ESPs may thus not fully reflect their relative use of exchange access."[22] The court upheld the access charge exemption, however, explaining that a

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[20] *See MTS and WATS Market Structure, 97 FCC 2d 682, 715 (1983).*

[21] *Id. at* 711.

[22] *National Association of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095, 1136 (D.C. Cir. 1984).

"graduated transition" to uniform access charges was not unreasonable given the Commission's professed desire "to preserve the ESPs' financial viability, and hence avoid adverse customer impacts.[23]

The FCC removed the temporary exemption for interexchange service resellers in 1986.[24] The following year it issued a Notice of Proposed Rulemaking tentatively concluding that it should eliminate the exemption for ESPs as well. In that Notice, the Commission reiterated its understanding that ESPs use exchange access service when they receive calls from their customers.[25]

The Commission ultimately had to reject its tentative conclusion because of the political firestorm generated by its proposal. In retaining the access charge exemption, however, the Commission in no way suggested that the traffic at issue was not access traffic. To the contrary, the Commission relied on the same policy consideration that was cited in support of the exemption in 1983 – namely, the desire to protect a fledgling industry from rate shock.[26]

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[23] *Id. at 1136-37.*

[24] *WATS-Related and Other Amendments of Part 69 of the Commission's Rules*, No. 86-1, 1986 FCC LEXIS 3812 (released March 21, 1986); *WATS-Related and Other Amendments of Part 69 of the Commission's Rules*, No. 86-1, 1986 FCC LEXIS 2788 (released Aug. 26, 1986).

[25] *See also Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rulemaking*, 2 FCC Rcd 4305, 4306 (1987) *(emphasis added)* ("We are concerned that the charges currently paid by enhanced service providers do not contribute sufficiently to the costs of the exchange access facilities they use in offering their services to the public.... [O]ur ultimate objective is to establish a set of rules that provide for recovery of the costs of exchange access used in interstate service in a fair, reasonable, and efficient manner from all users of access service, regardless of their designation as carriers, enhanced service providers, or private customers.")

[26] *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2633 (1988). ("[G]iven the combined effects of the impending ONA implementation and the entry of the BOCs into certain aspects of information service, the

More recently, in the *Access Reform Order*, the Commission again declined to impose access charges on ESPs. Once again, it did so on policy grounds. Specifically, it found that "[t]he access charge system contains non-cost-based rates and inefficient rate structures" that were not wholly addressed by access reform.[27] The Commission also found that access charges may not reflect certain differences between circuit-switching and packet switching, and that it was not convinced that the exemption imposed uncompensated costs on LECs or contributed to network congestion. At the same time, the Commission issued a Notice of Inquiry to consider the implications of information services more broadly and in ways that are sensitive to the complex economic, technical, and legal questions they present.

As Ameritech has previously argued, the necessary predicate to all of these rulings was the Commission's recognition that ESP traffic is access traffic. Quite obviously, the Commission would not have found it necessary to exempt ESP traffic from the Part 69 access charge regime were it not interstate access traffic in the first place. Nor would the Commission have revisited that exemption in 1987 by proposing to impose access charges on enhanced service providers. Certainly, the Commission would not have based this exemption and every one of its subsequent decisions to retain that exemption on policy grounds.

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imposition of access charges at this time is not appropriate and could cause such disruption in this industry segment that provision of enhanced services to the public might be impaired.")

[27] *Access Charge Reform*, 12 FCC Rcd 15982 (1997) at ¶ 344-348.

Indeed, if ISP traffic was not interstate access traffic, the Commission would not even have had the authority to decree that enhanced service providers be treated as end users for access charge purposes. The FCC would have had no authority to address how intrastate services should be priced – *i.e.*, whether local or intrastate access rates should apply. In this respect, the claim by CLECs that ISP traffic is local is especially ironic: in holding that ISPs should have the right to purchase access from end user tariffs, the FCC continues to exercise jurisdiction over ISP traffic – jurisdiction it does not have over traffic that is local.

Of course, none of this is rocket science, and a number of CLECs, including ALTS, agreed in their pleadings filed last year that a dial-up connection to the Internet is jurisdictionally interstate. In fact, some of them echoed the very arguments Ameritech made in this regard. For example, a consortium of CLECs calling themselves the Joint Commenters wrote:

> From the beginning the ESP "exemption" has been premised on the assumption that the traffic sent between end users and ESPs is jurisdictionally interstate. If the traffic were not interstate, there would have no need for an "exemption" in the first place, because interstate access charges could not lawfully have been applied.[28]

Likewise, AT&T stated:

> ISP traffic is overwhelming and inseparably interstate in nature and is unlike local business traffic because, for the vast majority of traffic, it is switched by the ISP at its local POP to distant data

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[28] Joint Commenters Comments in CCB/CPD 97-30 at 12.

centers or Internet sites located in other states (or other countries).[29]

Some of these very same CLECs, however, now have executed an abrupt about-face. Having awakened to the implications of their earlier concession – in particular, the reality that this traffic could not be deemed to terminate at the ISP switch if it is interstate traffic - they now maintain that ISP traffic is, after all, local traffic. As discussed below, these arguments are frivolous.

## III. CLEC CLAIMS THAT ISP TRAFFIC IS LOCAL ARE WRONG.

In claiming that a connection to an ISP is local traffic that terminates at the ISP switch, and thereby seeking rejection of GTE's DSL tariff, CLECs essentially offer three arguments. One is based on a misrepresentation of the ESP access charge exemption; the other two are based on the status of ISPs as information service providers. All are frivolous.

### A. The Access Charge Exemption Did Not and Could Not Alter the Boundaries of ISP Traffic.

CLECs argue, first, that the Commission's access charge exemption effectively transferred jurisdiction of ISP traffic, including DSL traffic, from the FCC to the states.[30] Ameritech addressed this claim in detail in its Comments and

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[29] AT&T Comments in CCB/CPD 97-30 at 2. *See also* ALTS June 20, 1997 letter at 6: (the ISP exemption "is part and parcel of the . . . interstate access charge regime'") ; CompuServe Comments in CCB/CPD 97-30 at 4 ("CompuServe believes that under well-established precedent the great preponderance of this information services traffic is jurisdictionally interstate as a matter of law"; and Sprint Comments in CCB/CPD 97-30 at 2.

[30] Designation Order at ¶ 5; ALTS Petition to Reject, or to Suspend and Investigate, May 22, 1998 at 2-6.

Reply Comments on ALTS' June 1997 petition. As Ameritech explained, the Commission's decision to treat ISPs as end users for access charge purposes was a pricing decision – nothing more and nothing less - a decision that, at least for now, ISPs should have the option of paying state-determined business line rates for connectivity to their end user customers. That decision had no impact whatsoever on the boundaries of ISP traffic or on the Commission's jurisdiction with respect to such traffic. Indeed, it could not have such an impact because, as noted, the boundaries of a communication are determined with reference to principles that have been recognized by the Commission and courts for over fifty years. These decisions are the bedrock of the federalism embodied in the Communications Act. They dictate the jurisdictional divisions between federal and state regulators. Their application is not a matter of agency discretion.

This point is critical because the CLECs repeatedly mischaracterize the access charge exemption – asserting over and over again that the exemption somehow magically transformed a jurisdictionally interstate communication into a local call. The Commission did no such thing, and it could not even if it had wanted to. What it did do is exempt ISPs from having to pay Part 69 rates for their access traffic and give them the option of paying local business rates instead. But, as has been long recognized, the classification of a service depends upon function, not facilities, and certainly not the price paid for it.[31] Thus,

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[31] *NARUC v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984)("The dividing line between the regulatory jurisdictions of the FCC and states depends on the 'nature of the communications which pass through the facilities [and not on] the physical location of the lines.'" (citations

regardless of whether an ISP pays local business rates or Part 69 rates to receive traffic from its end user customers, it is function that counts, and the services used in this regard are, functionally, still access services. More importantly, regardless of what the service is called, its boundaries are defined the same way the boundaries of all communications are defined – with reference to its ultimate beginning and end points. Exemption or no exemption, ISP traffic does not terminate at the ISP switch.

The recent Eighth Circuit decision affirming the Commission's decision to continue the ISP access charge exemption confirms that the connection from an end user to an ISP access is not local traffic. In affirming the Commission's decision, the court held that the facilities used by ISPs to receive traffic from their end user customers are "jurisdictionally mixed" and that the "FCC cannot reliably separate the two components involved in completing a particular call, or even determine what percentage of the overall ISP traffic is interstate or intrastate[.]" The court held that it was therefore not unreasonable for the Commission to exempt ISPs from paying interstate access charges and to rely solely on the interstate portion of the subscriber line charge for interstate cost recovery.[32]

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omitted); *Id.* at 1498 ("Every court that has considered the matter has emphasized that the nature of the communications is determinative rather than the physical location of the facilities used."). *See also*(*Universal Service Report* at ¶ 59 (1998). and at ¶¶ 88-90 (suggesting that IP telephony service providers may be telecommunications service providers because "from a functional standpoint, users of these services obtain only voice transmission, rather than information services such as access to stored files").

[32] *Southwestern Bell Telephone Company v. FCC*, No. 97-2618 (8th Cir. Aug. 19, 1998) at 40.

Ameritech believes that this decision was incorrect and that the jurisdictionally mixed nature of ISP traffic should have nothing to do with whether access charges apply to that traffic.[33] Nevertheless, the court's conclusion that ISP traffic is jurisdictionally mixed necessarily means that this traffic could not possibly terminate at the ISP switch: otherwise, it would all be, not merely intrastate, but local.

### B. Access Services Are Not Limited to the Origination and Termination of Telephone Toll Services.

A second CLEC argument, advanced by Focal and ICG, is that, in order for a service to be classified as an access service, the service must be an offering of access to telephone exchange services or facilities for the purpose of origination and termination of telephone toll service. This argument is incorrect and irrelevant. It is incorrect because, what Focal and ICG represent as the definition of "access service" is, in fact, the statutory definition of *"exchange* access service."[34] Irrespective of whether DSL service is *exchange* access service – an issue the Commission may address in its section 706 proceeding - it is, generically, an access service.

Indeed, the cramped definition of "access" that Focal and ICG suggest is contrary to longstanding precedent. For years, the Commission has used the term "access" and "exchange access" interchangeably. Whichever term was

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[33] To the extent the traffic is separable, interstate and intrastate access charges could apply, but, in this case, the traffic is not separable.

[34] *See* 47 U.S.C. § 153(16) (emphasis added).

used, the Commission has always recognized that the defining characteristic of access service is use of local exchange facilities to originate or terminate an interexchange communication, irrespective of whether that communication constitutes a toll call, a private line service, or an information service. As the Commission observed when it established the access charge regime:

> Among the variety of users of access service are facilities-based carriers, resellers (who use facilities provided by others), sharers, privately owned systems, enhanced service providers, and other private line and WATS customers, large and small, who "leak" traffic into the exchange. In each case the user obtains local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location.[35]

Obviously, many of these entities would not be users of access service if access service could only be used for the origination or termination of telephone toll service.

In any event, the issue of whether DSL service fits the definition of *exchange* access service – or, rather, is some other form of access - need not be decided in this proceeding. That is because the Commission's jurisdiction hinges, not upon whether DSL service is exchange access service, but on whether

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[35] MTS and WATS Market Structure, 97 FCC 2d 682, 711 (1983). *See also Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rulemaking*, 2 FCC Rcd. 4305,4306 (1987): ("As we have frequently emphasized ... our ultimate objective it to establish a set of rules that provide for recovery of the cost of exchange access used in interstate service in a fair, reasonable, and efficient manner from all users of access service, regardless of their designation as carriers, enhanced service providers, or private customers. Enhanced service providers, like facilities-based interexchange carriers and resellers, use the local network to provide interstate services. To the extent that they are exempt from access charges, the other users of exchange access pay a disproportionate share of the costs of the local exchange that access charges are designed to cover.")

it is an interstate telecommunications service. If it is, it must be tariffed at the FCC; if not, it should not be.

On this point, the law is clear. DSL service – like any other Internet access service - is used to connect end users to their ISPs so that those users may send messages over the Internet to locations around the country and around the world. While some of this Internet traffic may be destined for intrastate or even local web sites and databases,[36] the vast majority of it unquestionably terminates outside the state in which the traffic originates.[37] Moreover, as FCC staff has acknowledged, the interstate and intrastate traffic are inseverable, both because a user may access multiple web sites during a single Internet session and because "internet routers have also not been designed to record sufficient data about

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[36] In its Petition to Reject, or to Suspend and Investigate GTE's DSL tariff, ALTS claims that, at oral argument on the appeal of the FCC's *Access Reform Order*, FCC counsel suggested that modern caching techniques made it "likely" that ISP traffic actually terminates either at the ISP location or somewhere near the ISP location within the state. Ameritech does not have the transcript of that oral argument and thus cannot determine exactly what Commission counsel said or meant. Suffice it to say that, while caching techniques make it "likely" that some miniscule amount of ISP traffic terminates at the ISP switch, any suggestion that such traffic is more than incidental, at least at this point in time, is absurd.

[37] *See* Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy*, OPP Working Paper No. 29 at 29 (March 1997).(*Digital Tornado*): "The FCC's theoretical jurisdiction over the Internet is quite expansive, because the Internet relies on communications facilities and services over which the FCC has longstanding and broad authority." *See also id.*: ""[I]t would be difficult to claim that the Internet does not, at some level, involve interstate communications[.]" *See also Universal Service Report* at n. 155 (noting that as of April 1995, about half of all Internet data traffic related to the World Wide Web and that this percentage was growing rapidly, while Usenet applications (accessing information that an ISP stores on its own computer facilities) represents a very small percentage of Internet data traffic).

packets to support jurisdictional segregation of traffic."[38] That being the case, under the inseparability doctrine, the FCC's exclusive jurisdiction is clear.[39]

### C. The Status of ISPs as Information Service Providers, Rather Than Telecommunications Service Providers, is Irrelevant.

ALTS has argued that "the telecommunications portion of the DSL call terminates at the point where the call reaches an ISP interconnected to GTE because ISPs are end users, and that any subsequent information services provided by the ISPs are irrelevant in determining the jurisdictional end points."[40] This argument, as well, is patently incorrect. In ruling that ISPs are information service providers, not telecommunications service providers, the Commission specifically noted that this decision had no bearing on the issue of whether CLECs that serve ISPs are entitled to reciprocal compensation: "[T]he question of whether competitive LECs that service Internet service providers ... are entitled to reciprocal compensation ... does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider."[41]

The reason the Commission recognized that the status of an ISP as information service provider is irrelevant to reciprocal compensation issues is

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[38] *See Digital Tornado* at 45.

[39] Under that doctrine, states "must stand aside when, as here, it is technically and practicably impossible to separate the two types of communications [interstate and intrastate] for tariff purposes." *See* GTE Direct Case at 18, *citing Amendments of Part 2 and 22 of the Commission's Rules*, 93 FCC 2d 908, 922 (1983), *aff'd mem., NARUC v. FCC*, 725 F.2d 125 (D.C. Cir. 1984).

[40] Designation Order at ¶ 5.

[41] *Universal Service Report* at n. 220.

quite simple: by definition, information service providers offer their services "via telecommunications."[42] As stated in the *Universal Service Report:* "[A]n Internet access provider must enable the movement of information between customers' own computers and the distant computers with which those customers seek to interact."[43] The suggestion by CLECs that telecommunications sent by an end user to a remote web site via an ISP somehow terminate at the ISP switch is thus incorrect.

Indeed, the CLECs' claim in this regard is based on a distortion of the distinction between a telecommunications service provider and an information service provider. The difference between a telecommunications service provider and an information service provider, such as an ISP, is that, while a telecommunications service provider offers pure transmission service, an information service provider offers something *more* than pure telecommunications transmission service to the public. Specifically, they combine telecommunications with enhancements, such as data processing and other functions. As stated in the *Universal Service Report:*

> [I]n order to provide those components of Internet access services that involve information transport, [ISPs] lease lines, and otherwise acquire telecommunications, from telecommunications providers – interexchange carriers, incumbent local exchange carriers, competitive local exchange carriers, and others. In offering service to end users, however,

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[42] *See* 47 U.S.C. § 3(20).

[43] *Universal Service Report* at ¶ 80. *See also id.* at ¶ 105 (noting that ISPs "leverage telecommunications connectivity" to provide their Internet services),

> they do more than resell those data transport services. They conjoin the data transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service.[44]

## IV. CLECs, NOT ILECs, HAVE BEEN FORUM SHOPPING.

In addition to arguing that ISP traffic is local traffic, a number of CLECs argued that GTE should be equitably estopped from asserting that ISP traffic is interstate traffic. These CLECs claimed that GTE's tariff is an exercise in forum shopping , designed to side-step state decisions that traffic from an end user to an ISP is local.

Aside from the fact that this is not a substantive argument, but an attempt to deflect attention away from substance, it could not be more incorrect. It is the CLECs, not the ILECs, that have been actively engaged in forum shopping with respect to the reciprocal compensation issue. It was the CLECs – not GTE or some other ILEC – that initially asked the Commission to clarify the status of ISP traffic under the reciprocal compensation provisions of the Act. They did so, not once, but *twice*: first in seeking reconsideration of the Commission's *Local Competition Order*,[45] and, again, in the June 1997 ALTS request. Significantly, the ALTS letter asserted that its request for clarification as to the application of

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[44] Universal Service Report at ¶ 81.

[45] *See* Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, 61 Fed. Reg. 53,922 (1996).